which he should serve for the purposes of retribution and deterrence.

It is however imperative that these declarations should be read in the context of the reasons for them which I have endeavoured to express.

WEBB DISTRIBUTORS (AUST.) PTY. LTD. & ORS.

v.

THE STATE OF VICTORIA & ANOR.

HIGH COURT, AUSTRALIA
MASON CJ, DEANE, DAWSON, TOOHEY, McHUGH JJ.
[F.C. 93/049]
10 NOVEMBER 1993

COMPANY LAW: Building societies wound up - Non-withdrawable shareholders in societies allege misrepresentation by societies - Shares represented to be redeemable - Rescission of contract of acquisition of shares precluded - Whether shareholders may bring action for damages against societies - Whether unliquidated damages provable in the liquidation of the societies.

The applicants in this appeal were appointed to represent holders of non-withdrawable shares in 3 building societies in Australia which were wound up on 13 December 1990 under s. 122 of the Building Societies Act 1986 (Vic) ("the Act"). The State of Victoria and the appointed liquidator were the respondents. The shareholders' (more than 10,000 in number) grievance was that the nature of the shares subscribed to were represented to them incorrectly in that they were led to believe the shares were redeemable and "like a deposit". The societies operated on a system which was not explained in the prospectus. However the duty of the Court was not to pass judgment on whether or not the societies had acted deceptively (the Court was asked to assume thus) but to address 2 underlying issues:

(1) Whether unliquidated damages claimed by the shareholders were provable in the liquidation of the societies; and
(2) Whether, since the share holders were precluded from rescinding the contract of acquisition of their shares, they were thereby precluded from claiming damages on the contract.

In submitting on these points the appellants contended that the '*Houldsworth*' Principle did not apply to building societies. In *Houldsworth v. City of Glasgow Bank* [1880] 5 App Cas 317, it was propounded that a shareholder may not, directly or indirectly, receive back any part of his or her contribution to the capital of the company.

The appellants also argued that a holder of non-withdrawable shares had a claim for damages against one of the building societies under s. 52 of the Trade Practices Act.

Held:

[1] The case has been treated as voluntary winding-up of a company under the Code and shall proceed on this basis. Section 360(1) of the Code (Pt. XII) states that company members are liable to contribute to the company's debts subject to certain qualifications stated therein

The statutory propositions authorising the return of capital are not inconsistent with the *Houldsworth* principle. The provisions permit a return of capital to shareholders if established to the Courts satisfaction that the said return would not prejudice the interests of creditors, or was otherwise consented to by creditors. Therefore the principle in *Houldsworth* was encoded in s. 360(1) and imported into the winding up of the societies by s. 121(4) of the Act.

[2] The Trade Practices Act is not intended to eliminate detailed provisions of the Code established for more than a hundred years in order to serve as the guide in the winding up of a company. The trade Practices Act cannot be taken to confer a power to declare a contract void which was valid at its inception.

[3] The liquidator cannot be bound by the principle of estoppel in that he be estopped from denying the fraudulent representations of the societies. Estoppel will not operate to give the appellants an entitlement which the terms of the Act and the Code combine to deny the holders.

The shareholders have no claim against the societies but the judgment does not affect any rights of a claim against the directors or officers.

[Appeal dismissed].

Cases referred to:

State of Victoria v. Hodgson [1992] 2 VR 613 ***(refd)***
Re Pyramid Building Society (in liq) [1991] 6 ACSR 691 ***(refd)***
Trevor v. Whitworth [1887] 12 App. Cas. 409 ***(refd)***
Ooregum Gold Mining Company of India v. Roper [1892] AC 125 ***(refd)***
Oakes v. Turguand [1867] LR 2 HL 325 ***(refd)***
Houldsworth v. City of Glasgow Bank [1880] 5 App. Cas. 317 ***(refd)***
Henderson v. The Royal British Bank [1857] 7 El & Bl 356 [119 ER 1279] ***(refd)***
Tennent v. City of Glasgow Bank [1879] 4 App. Cas. 615 ***(refd)***
Elder's Trustee and Executor Co. Ltd. v. Commonwealth Homes and Investment Co. Ltd. [1941] 65 CLR 603 ***(refd)***
In re Hull and County Bank (Burgess' Case) [1880] 15 Ch. D 507 ***(refd)***
Southern British National Trust Ltd. v. Pither [1937] 57 CLR 89 ***(refd)***
In re Addlestone Linoleum Company [1887] 37 Ch D 191 ***(refd)***
Re Dividend Fund Inc. (In Liq.) [1974] VR 451 ***(refd)***
Milne v. Durham Hosiery Mills Ltd. [1925] 3 DLR 725 ***(refd)***
In re Dale and Plant Ltd. [1889] 43 Ch. D 255 ***(refd)***
In re Harlou Pty. Ltd. (In Liq.) [1950] VLR 449, at p. 454 ***(refd)***
Parkdale Custom Built Furniture Pty. Ltd. v. Puxu Pty. Ltd. [1982] 149 CLR 191 ***(refd)***
Trade Practices Commission v. Milreis Pty. Ltd. [1977] 14 ALR 623 ***(refd)***
Burkinshaw v. Nicolls [1878] 3 App. Cas. 1004 ***(refd)***
Tanning Research Laboratories Inc. v. O'Brien [1990] 169 CLR 332 ***(refd)***
In re Exchange Securities Ltd. [1988] Ch. 46 ***(refd)***
Devenish v. Jewel Food Stores Pty. Ltd. [1991] 172 CLR 32 ***(refd)***
Bull v. Attorney-General for New South Wales [1913] 17 CLR 370 ***(refd)***
Account Systems v. CCM [1993] 114 ALR 355 ***(refd)***
Vagrand Pty. Ltd. (in Liq.) v. Fielding [1993] 113 ALR 128 ***(refd)***
Knight v. F.P. Special Assets Ltd. [1992] 174 CLR 178 ***(refd)***
Brown v. Rezitis [1970] 127 CLR 157 ***(refd)***
Hoffman v. Industrial Commission (NSW) [1990] 33 IR 139 ***(refd)***
Fernance v. Wreckair Pty. Ltd. [1991] 22 NSWLR 439 ***(refd)***

Legislation referred to:

Bankruptcy Act 1966, s. 82(2), Part VI (Cth)
Building Societies Act 1874 (Vic.)
Building Societies Act 1986, ss. 3(1), 48(1)(2), 49(1), 53(2), 87(1), 114(2), 121(1)(c)(4), 139(3), rr. 11, 25, 149 (Vic.)
Companies (Victoria) Code, ss. 5(1), 123, 360(1)(k), 438(2), Pt XII
Corporate Law Reform Act 1992, s. 102 (Cth)
Corporations Law, ss. 195, 563A
Financial Institutions (Victoria) Code
Industrial Arbitration Act 1940, s. 88F (NSW)
Trade Practices Act 1974, ss. 52, 87 (Cth)
Building Societies Act 1874 (UK)
Companies Act 1862, s. 38(7) (UK)
Companies Act 1985, s. 111A (UK)
Joint Stock Companies Winding Up Act 1844 (7 & 8 Vict. c. 111) (UK)
Limited Liability Act 1855 (18 & 19 Vict. c. 133) (UK)

Other sources referred to:

Fletcher **Cyclopedia of the Law of Private Corporations,** Vol. 4, (1985), pp. 486-510
Ford's **Principles of Corporations Law,** 6th Edn., (1992), p. 299

Modern Law Review 362, (1950), 13 at p. 367
Modern Law Review 54, (1956), 19 at p. 61
The Principles of Modern Company Law, (1954), pp. 63-64, 279, 314-315

For the appellants - Gadens Ridgeway
For the 1st respondent - R.C. Beazley
For the 2nd respondent - Madgwicks

JUDGMENT

Mason CJ, Deane, Dawson and Toohey JJ: This appeal, arising from the collapse in 1990 of three Victorian building societies, concerns the position of more than 10,000 non-withdrawable shareholders in those societies.

The background

The Pyramid, Geelong and Countrywide Building Societies were part of the Farrow Group, the head office of which was in Geelong. Each building society is deemed to have been incorporated and registered under the Building Societies Act 1986 (Vic.) ("the Act") s. 139(3). A new legislative scheme for the regulation of building societies in Victoria was introduced in 1992 by the Financial Institutions (Victoria) Code. As a consequence, most of the provisions of the Act have been repealed but remain in force for the purposes of this case. In 1990 the Pyramid Building Society was one of the largest in Australia, with 38 branches located in Melbourne, Geelong and Victorian country towns. As at 22 June 1990, when an administrator was appointed to conduct the affairs of the societies pursuant to s. 114 of the Act, there was an amount of $1,144,659,000 on deposit with that society. Geelong and Countrywide Building Societies were much smaller operations.

In February 1990 the three building societies experienced a run on their funds; this abated temporarily and then resumed at an accelerated pace in May 1990. As already noted, an administrator was appointed. On 13 December 1990 each of the building societies was wound up on the certificate of the Registrar of Building Societies pursuant to s. 122 of the Act. Anthony George Hodgson, the second respondent, was appointed liquidator of each building society under s. 121(1)(c).

The three societies began to market non-withdrawable shares to the public in late 1986. Many of the holders of those shares complain that they were misled as to the nature of the shares. Their complaints generally focus on statements alleged to have been made on behalf of the societies that the shares were redeemable and "like a deposit" and that they were thereby diverted from their intention to invest as depositors. The societies instituted a system by which one society would take a transfer of the shareholding in another society from an investor wishing to "redeem", in anticipation of making those shares available to a prospective investor. Clearly that system depended upon the availability of potential new investors; in the meantime shares were held on what were known as "inter-society holdings". The "prospectuses" did not explain this system. They stated only that the building societies would maintain a register of persons wishing to take transfers.

However, the question of whether any of the societies misrepresented the nature of non-withdrawable shares is not before this Court. The Court was asked to assume, as was the Supreme Court of Victoria, that there had been misleading or deceptive conduct, such as would ground an action in deceit or under s. 52 of the Trade Practices Act 1974 (Cth) and perhaps give rise to other causes of action.

History of the proceedings

Proceedings were taken in the Supreme Court of Victoria by the liquidator for directions as to the position of the non-withdrawable shareholders. The appellant Webb Distributors (Aust.) Pty. Ltd. was appointed to represent the holders of non-withdrawable shares in Geelong Building Society. The two other appellants were appointed to represent the holders of like shares in Pyramid Building Society and Countrywide Building Society respectively. The State of Victoria was added as a respondent because the State had taken an assignment of the claims of depositors in the building societies and thereupon become the societies' major creditor. The State was effectively the respondent in this Court, the liquidator largely confining his submissions to matters of information to assist the Court.

The questions asked by the liquidator were primarily aimed at determining whether:

(a) unliquidated damages claimed by non-withdrawable shareholders are provable in the liquidation of the building societies;
(b) non-withdrawable shareholders are now precluded from rescinding the contracts under which they acquired their shares

> and whether they are thereby precluded from prosecuting an action for damages against the building societies in relation to the acquisition of the shares.

Vincent J. answered the questions favourably to the appellants. That is, his Honour held that the damages claims were provable in liquidation and that, while the shareholders were precluded from rescinding their contracts by reason of the liquidation, they were not precluded from maintaining an action for damages and were therefore in the same position as depositors and other unsecured creditors. On appeal, the Appeal Division of the Supreme Court of Victoria (Tadgell J., Fullagar and Gobbo JJ. concurring) answered the questions adversely to the appellants, holding that they could not prove in liquidation because they were precluded both from rescinding the contracts under which they acquired shares and from maintaining an action for damages in respect of that acquisition, *State of Victoria v. Hodgson* [1992] 2 VR 613.

After a detailed examination of the relevant legislation and legal principles, Tadgell J. reached the following conclusion *ibid*, at p. 627:

> In my opinion the principle of limited liability leads inevitably to the conclusion that a member at the commencement of the winding up of a company limited by shares cannot prove in the winding up for damages designed to indemnify him for loss sustained in subscribing share capital to the company. The member's only title to such damages would depend on his having sustained loss through a subscription of share capital. If he were to obtain indemnity from the company in respect of that loss he could not logically be regarded as having subscribed the share capital for the subscription of which the company had indemnified him.

It is this conclusion, in particular its application to the building societies, that the appellants attacked.

Share capital

Section 48(1) of the Act empowers a building society to raise funds "by the issue of shares in accordance with its rules". Section 48(2) reads:

> If a building society is being wound up -
>
> (a) the holders of permanent shares rank after unsecured creditors; and
> (b) the holders of withdrawable shares rank with unsecured creditors.

"Permanent share" is defined by s. 3(1) of the Act to mean "a share the capital of which cannot be withdrawn by the member".

Section 49 of the Act provides that as from 1 January 1989 a building society must maintain a "capital account" (defined by s. 49(1) to mean the issued and paid up permanent share capital plus reserves) equal to 2.5% of the value of the total assets of the society. As a means of protecting those who deal with a building society, the provision has its deficiencies since, if the assets of the society diminish, the amount required to be secured in the capital account is reduced correspondingly. This may be the very time at which the level of safeguards needs to be maintained. There are however other protective provisions: See, for instance, ss. 53(2), 114(2), 122(1).

The rules of each building society provided in r. 11 for various classes of shares: investing shares, permanent shares and borrowing shares. Investing shares were in turn subdivided into classes, including non-withdrawable investing shares. The advantage to the holders of non-withdrawable shares was an expectation each year of a rate of interest. 1% higher than the average highest term deposit rate for that year.

By r. 149 of each society, in the event of a winding up losses are borne first by members holding permanent shares, secondly by members holding non-withdrawable investing shares and thirdly by unsecured creditors. In the present case, the assets of the building societies are unlikely to be sufficient to pay unsecured creditors in full. If the holders of non-withdrawable shares have no claim as unsecured creditors, the probability is are that they will receive nothing in distribution.

Limited liability

By reason of s. 121(4) of the Act, Pt XII of the Companies (Victoria) Code ("the Code") applies, "with such modifications as are necessary", to the winding up of a building society. The matter has proceeded in the courts below and in this Court on the footing that the winding up of each of the three building societies is to be treated as though it were the voluntary winding up of a company under the Code. That approach is in conformity with the decision in *Re Pyramid Building Society (in liq.)* [1991] 6 ACSR 691 where J.D. Phillips J. held that the relevant provisions of the Code are those that ordinarily apply in the voluntary winding up of a company.

Section 360(1) of the Code, which appears in Pt XII, provides that on the winding up of a company members are liable to contribute to the company's debt subject to certain qualifications, including:

> (e) in the case of a company limited by shares, no contribution is required from a member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member;
> ...
> (k) a sum due to a member in his capacity as a member by way of dividends, profits or otherwise shall not be treated as a debt of the company payable to that member in a case of competition between himself and any other creditor who is not a member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

While the Act does not in terms limit the liability of members, The Building Societies Act 1874 (Vic.), modelled on the Building Societies Act 1874 (UK), provided for the first time in Victoria for the incorporation of building societies and for limitation of the liability of members. The limitation provision was repeated in subsequent Building Societies Acts, but not in the legislation under present consideration, r. 25 of the rules of each society provides that the liability of a member "shall be limited to the amount, if any, unpaid on shares held by him, together with any charges payable by him to the society pursuant to these Rules".

Section 5(1) of the Code defines "company limited by shares" to mean "a company formed on the principle of having the liability of its members limited by the memorandum to the amount (if any) unpaid on the shares respectively held by them". While the building societies had no memoranda, r. 25 was correctly treated by Tadgell J. as sufficient to import para (e) of s. 360(1). As his Honour pointed out, if this were not the case, "members would appear to be subjected to unlimited liability by reason of s. 360(1) of the Code", [1992] 2 VR, at p. 618.

The authorities

Underlying the conclusion reached by the Appeal Division are two related streams of authority. The first is epitomised by *Trevor v. Whitworth* [1887] 12 App. Cas. 409 and *Ooregum Gold Mining Company of India v. Roper* [1892] AC 125; the second by *Oakes v. Turquand* [1867] LR 2 HL 325 and *Houldsworth v. City of Glasgow Bank* [1880] 5 App. Cas. 317. These cases were decided after the enactment of the Companies Act 1862 (UK) which consolidated the Joint Stock Companies Acts and became the parent of modern companies legislation. Earlier, shareholders had been treated as partners who could be sued personally though from 1844 there was some limitation on personal liability. See Joint Stock Companies Winding Up Act 1844 (7 & 8 Vict. c. 111) (UK) and Limited Liability Act 1855 (18 & 19 Vict. c. 133) (Eng.) see also *Henderson v. The Royal British Bank* [1857] 7 El & Bl. 356 [119 ER 1279]. The Companies Act 1862 contained s. 38 which was the forerunner of s. 360(1) of the Code. Section 38 relevantly read:

> In the event of a Company formed under this Act being wound up, every present and past member of such Company shall be liable to contribute to the assets of the Company to an amount sufficient for payment of the debts and liabilities of the Company, and the costs, charges, and expenses of the Winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following.

The language of s. 360(1) of the Code is similar; in particular, paras (4) and (7) of s. 38 are repeated in almost identical terms in paras (e) and (k) of s. 360(1) set out earlier in this judgment.

Trevor v. Whitworth held that a company incorporated under the Companies Act 1862 had no power to purchase its own shares. The reason for this limitation is to be found in the judgment of Lord Watson [1887] 12 App. Cas., at pp. 423-424:

> One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the Court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain

> amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business.

This principle was affirmed by the House of Lords in *Ooregum Gold Mining Company of India v. Roper* in holding that a company, formed under the 1862 Act, had no power to issue shares as fully paid up for a money consideration less than their nominal value. Lord Halsbury LC [1892] AC at p. 133 considered that the requirement of the 1862 Act that the capital of a company be divided into shares of a certain fixed amount:

> renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares.

Lord Macnaghten put the matter equally strongly when he said *ibid.*, at p. 145:

> I cannot, I think, do better than adopt the language Mr. Buckley has used in speaking of the Limited Liability Acts. 'The dominant and cardinal principle of these Acts', he says, 'is that the investor shall purchase immunity from liability beyond a certain limit, on the terms that there shall be and remain a liability up to that limit'.

The second line of authority begins with *Oakes v. Turquand* which held that once the winding up of a company had begun a shareholder could not rescind a contract for the purchase of shares on the ground of fraud. The basis of this decision was expressed in *Tennent v. City of Glasgow Bank* [1879] 4 App. Cas. 615, per Earl Cairns LC at p. 621 to be that "innocent third parties have acquired rights which would be defeated by the rescission". On that basis the House of Lords in *Tennent* refused to allow an action for "reduction" of a contract to take shares in a joint stock company following a report to shareholders that the company's insolvency would necessitate large calls, even though an extraordinary resolution to wind up the company voluntarily was not passed until the day following issue and service of the summons for reduction. *Tennent* was distinguished on the facts in *Elder's Trustee and Executor Co. Ltd. v. Commonwealth Homes and Investment Co. Ltd.* [1941] 65 CLR 603.

Both *Oakes v. Turquand and Tennent v. City of Glasgow Bank* were affirmed by the House of Lords in *Houldsworth v. City of Glasgow Bank*. Their Lordships held that not only could a shareholder not rescind the purchase of shares induced by fraudulent misrepresentation once the bank from which the shares had been purchased had gone into liquidation, even though he might have been entitled to do so had the bank been a going concern, but also the shareholder lost any right to claim damages on the happening of that event. *In re Hull and County Bank (Burgess's case)* [1880] 15 Ch. D 507, Jessel MR, in the course of argument, put the matter succinctly when he said *ibid.*, at pp. 509-510:

> The doctrine is that after the company is wound up it ceases to exist, and rescission is impossible. There are then only creditors and co-contributories and no company, and that is the meaning of Lord Cairns' observations in *Houldsworth v. City of Glasgow Bank*.

In his judgment the Master of the Rolls amplified his earlier remarks, emphasising that before winding up a creditor has no right against any one shareholder but must look to the company. After winding up, the company, though not technically ceasing to exist for all purposes, does so for the purposes of recovery. After winding up, the position is governed by the winding up provisions. In this regard Jessel MR said *ibid.*, at p. 512:

> The liabilities are no longer the liabilities of the company except to the extent of the assets realized, which under the 38th section of the Act are to be appropriated towards the satisfaction of such liabilities, but they become liabilities of the shareholders who are such at the time of the winding-up, that is, of the past and present members, including those who have been shareholders within the year; and those liabilities ... are defined by the 38th section.

Southern British National Trust Ltd. v. Pither [1937] 57 CLR 89 was not concerned with the same issue as is now before the Court. But, in the course of his judgment, Dixon J. *ibid.*, at p. 113 referred to:

> the well known rule that a member of a company loses on the commencement of a winding up any right he might otherwise have had to the rescission of his contract of membership.

Later Dixon J. referred *ibid.,* at p. 114 to the judgment of Jessel MR in *Burgess's Case* as authority for this proposition:

> But the fact that, when the company suspended and went into liquidation, an entire change took place in the relation of creditors and shareholders to the assets and of shareholders *inter se* made the rule inevitable.

The principle in *Oakes v. Turquand* is not in issue. It was common ground that the holder of shares ordinarily loses any right to rescission on winding up. But the appellants challenged *Houldsworth* in so far as that decision also precluded any claim for damages. Whatever criticisms may be made of the reasoning in *Houldsworth,* the decision has been applied or treated as applicable to limited companies not only in the United Kingdom, *In re Addlestone Linoleum Company* [1887] 37 Ch. D 191 but also in Australia, *Re Dividend Fund Inc. (In liq.)* [1974] VR 451 and Canada, *Milne v. Durham Hosiery Mills Ltd.* [1925] 3 DLR 725. Counsel referred to a number of American authorities. No clear picture emerges from these decisions. Different views have been taken in different States, some adopting the rule in *Oakes v. Turguand* and others permitting rescission after winding up where there has been some particular element present or absent, often drawing on the concept of laches. See generally Fletcher **Cyclopedia of the Law of Private Corporations,** Vol. 4, (1985), pp. 486-510. The Court was not taken to any American decision in which *Houldsworth* itself was considered.

The decision in *Houldsworth* has been explained in various ways. It was perhaps best explained by Lindley LJ in *In re Addlestone Linoleum Company* in these words [1887] 37 Ch. D, at pp. 205-206:

> The principle on which the House of Lords decided, *Houldsworth v. City of Glasgow Bank* was that a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money - he must not directly or indirectly receive back any part of it.

While conscious of the criticisms that have been made of *Houldsworth* ("[t] he decision no doubt bears the stamp of its era" [1992] 2 VR, at p. 625, Tadgell J. concluded that the decision received statutory recognition in s. 360(1) of the Code and was thereby necessarily imported in the winding up of the three building societies. His Honour's view was that the winding up provisions of the Code were such that "even if a proof were lodged claiming unliquidated damages by way of indemnity against a shareholder's loss arising from his subscription for shares, it would be ultimately unavailing. *ibid.,* at p. 629.

Houldsworth was followed by Anderson J. in *Re Dividend Fund Inc. (In Liq.)* [1974] VR 451 in refusing a claim for damages brought by a shareholder against an unlimited company in liquidation, the claim arising in respect of unpaid calls. Anderson J. commented *ibid.,* at p. 454:

> The reasoning in *Houldsworth's* case makes it plain that for a shareholder to have a right to claim damages against the company would involve his being obliged as a member of the company to satisfy, or join with other shareholders in satisfying, his own claim. In the case of an unlimited company ... something akin to perpetual motion would be involved for the merry carousel would go on till the end of time, the aggrieved shareholder being eventually obliged to pay call after call to meet his own claim in damages.

The company in question was an unlimited company and the authors of Ford's **Principles of Corporations Law,** 6th Edn., (1992), p. 299 comment: "It may be that *Houldsworth's* case can be confined in Australia to unlimited companies".

Houldsworth was the subject of an amicable exchange between Mr. Hornby and Professor Gower in the pages of the **Modern Law Review.** Gower in "Notes of Cases", (1950) 13 **Modern Law Review** 362, at p. 367; Hornby, "*Houldsworth v. City of Glasgow Bank",* [1956] 19 **Modern Law Review** 54; reply by Gover, at p. 61; response by Hornby, at p. 185. Professor Gower had been critical of *Houldsworth* and had incorporated that criticism in his then recent work **The Principles of Modern Company Law** published in 1954; see pp. 63-64, 279, 314-315. In the second edition of that text, published in 1957, Professor Gower p. 295 spoke of "the anomalous rule, laid down by the House of Lords in *Houldsworth v. City of Glasgow Bank,* to the effect that damages cannot be recovered from the company unless the allotment of shares is also rescinded". He added:

> In laying down this rule the House do not seem to have recognised fully the separation

> between the corporate entity and the member, but the decision can be explained on two grounds. The first is that to recover damages would be inconsistent with the terms of the implied contract between all the shareholders. The second justification depends on the recognition of share capital as a guarantee fund for creditors.

It must be acknowledged, however, that the preservation of share capital for the protection of creditors is an argument against the recovery of damages by a shareholder as well as against rescission. Both remedies deplete the assets of the company.

However, the critical question is not whether *Houldsworth* is right or wrong but whether the proposition which the House of Lords distilled in the case from the provisions of the Companies Act 1862 is incorporated in the provisions of the Code. That proposition, namely, that a shareholder may not, directly or indirectly, receive back any part of his or her contribution to the capital of the company, cannot now be supported in absolute terms. A direct return of capital may be effected with the approval of the Court having regard, *inter alia,* to the interests of creditors. See s. 123 of the Code; s. 195 of the Corporations Law.

The statutory provisions authorising the return of capital are not inconsistent with the *Houldsworth* proposition. Indeed, they proceed on an acceptance of part of the reasoning which underpinned the decision in that case. They permit a return of capital to shareholders when it is established to the satisfaction of the Court that the return of capital will not prejudice the interests of creditors or when it is consented to by creditors. Hence, the statutory provisions treat the subscribed capital as a protection to creditors and accept that the capital should not be returned directly to shareholders otherwise than pursuant to a permissible reduction of capital.

Tadgell J. concluded that the principle in *Houldsworth* received statutory recognition in s. 360(1) of the Code and was therefore imported into the winding up of the three building societies by s. 121(4) of the Act. In our view, the conclusion reached by his Honour was correct and it draws support from the provisions of s. 360(1)(k).

Section 360 imposes an obligation on members to contribute to the payment of all the liabilities of a company on its liquidation. Paragraph (e) limits that obligation to the amount unpaid on the members' shares. Paragraph (k) subordinates sums due to a member in his or her capacity as a member to sums due to non-members.

In *In re Addlestone Linoleum Company* some members sought leave to tender proofs on the winding up against the company for damages for breach of contract in relation to the issue of shares in respect of which they had become contributories. At first instance Kay J. held that the sums claimed fell within s. 38(7) of the Companies Act 1862, which is, in all material respects, identical to s. 360(1)(k). Kay J. said [1887] 37 Ch D, at pp. 197-198:

> Now, unquestionably the applicants - retaining these shares and claiming damages because the shares are not exactly what they were represented to be - are making such claims in the character of members of the company, and the only question is whether such claims are for sums due 'by way of dividends, profits, or otherwise'.

His Honour then went on to hold that that question should be answered in the affirmative because the applicants were seeking to recover a dividend in respect of the share capital which they were compelled to pay on the winding up. In practice, this would have meant recovery from the pockets of creditors of the share capital that they, as contributories, were liable to pay *ibid.*, at p. 198. The Court of Appeal dismissed an appeal from the decision of Kay J., principally by reference to the decision in *Houldsworth.* However, Lopes LJ agreed *ibid.*, at p. 206 with the construction placed upon s. 38(7) by Kay J. And Cotton LJ, with reference to the applicants, stated *ibid.*, at p. 205 that "now they come here as shareholders, and in substance retain their shares, and seek to sue the company for breach of the contract under which they took them". In our view, s. 360(1)(k) bears the same interpretation as that which Kay J. held s. 38(7) of the Companies Act 1862 to bear.

In so far as it is relevant, the subsequent legislative history has supported this interpretation of s. 360(1)(k). Section 563A of the Corporations Law:

> Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all

> debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied.

inserted by s. 102 of the Corporate Law Reform Act 1992 (Cth) which came into operation on 23 June 1993, appears under the heading "Priorities" and differs from s. 360(1)(k) of the Code in that it draws more strongly on the language of priority. However, in relation to s. 563A the explanatory memorandum to the Corporate Law Reform Bill 1992 asserts that the section was intended to have the same effect as the then current s. 525, a provision virtually identical in its terms to s. 360(1)(k). Contrast the position in the United Kingdom where a person is not now debarred from obtaining damages from a company "by reason only of his holding or having held shares in the company": Companies Act 1985 (UK), s. 111A

Paragraph (k) of s. 360(1) will not prevent claims by members for damages flowing from a breach of a contract separate from the contract to subscribe for the shares; *In re Dale and Plant Ltd.* [1889] 43 Ch D 255; *In re Harlou Pty. Ltd. (In Liq.)* [1950] VLR 449, at p. 454. But, in the present case, the members seek to prove in the liquidation damages which amount to the purchase price of their shares, which is a sum directly related to their shareholding. Moreover, they sue as members, retaining the shares to which they were entitled by virtue of entry into the agreement and they seek to recover damages because the shares are not what they were represented to be. Accordingly, the claim falls within the area which s. 360(1)(k) seeks to regulate: the protection of creditors by maintaining the capital of the company.

In that regard it should be noted that s. 360(1)(k) provides that a sum due to a member in his or her capacity as a member may be taken into account for the purposes of the final adjustment of the rights of contributories among themselves. To that extent the member with a claim against the company occupies a preferred position to other members.

Application of the Houldsworth principle to building societies

The appellants argued however that any principle emanating from *Houldsworth* had no necessary application to building societies.

It must be understood that, at least until late in the nineteenth century, contributions made by members to building societies were, as Tadgell J. observed, "withdrawable, subject to their rules, more or less at will" [1992] 2 VR, at p. 618. Until 1976 the relevant legislation in Victoria reflected that approach. The Building Societies Act of that year authorised building societies to raise capital by the issue of shares and required a minimum permanent capital, s. 20. The Act (that is, the Act with which this judgment is concerned) gave the term "share" the same meaning as it bore in the Code, namely, "share in the capital of a corporation", s. 31(1) of the Act; s. 5(1) of the Code. The Act introduced the notion of a permanent share capital, represented by "permanent shares" and the requirement of a "capital account". Thus, for relevant purposes, the position of building societies was brought into line with that of other corporate bodies.

Mention has been made already of s. 121(4) of the Act which applies Pt XII of the Code, "with such modifications as are necessary", to the winding up of a building society. The State of Victoria also pointed to particular sections of the Act which, it said, placed a shareholder in a building society in no different position to a shareholder in any company limited by shares. It is unnecessary to dwell on these provisions in any detail. They are provisions relating to the Registrar; incorporation and its consequences; the capital of a building society; the availability for inspection of accounts, reports and returns; and winding up. Sections 5, 38, 48, 49, 83, 88, 90, 121 and Sched. 2 para 2(5)(a) are in point.

The argument that building societies do not relevantly stand in any different position to companies incorporated under the Code or Corporations Law is persuasive, particularly when regard is had to s. 360(1) of the Code.

Trade Practices Act

The appellants developed an argument that, whatever be the position in respect of other claims they might have against the building societies, any claim under the Trade Practices Act must be taken to be unaffected by s. 360(1) of the Code. The argument assumed that a holder of non-withdrawable shares had a claim for damages against one of the building societies under s. 52 of the Trade Practices Act. Tadgell J. rejected the appellants' argument and said [1992] 2 VR, at p. 631:

> To hold otherwise would be to regard the Trade Practices Act as intending to overturn

> by implication a cardinal tenet of limited liability which has prevailed for 130 years. It would be surprising indeed if the Trade Practices Act had that intention or effect ... It would in any event be inappropriate to decide the point in a factual vacuum.

The State of Victoria did not ask this Court to refrain from dealing with the operation of the Trade Practices Act "in a factual vaccum". But it must be said that there is such a vacuum; what follows must be read in that context.

Section 360(1)(k) of the Code does not, in terms, preclude an action under s. 52 of the Trade Practices Act. It looks only to the situation of a competition between a member to whom a sum is due by the company and a creditor who is not a member. It provides that in such a case the sum due shall not be treated as a debt owed by the company. Clearly, the Trade Practices Act is not concerned to regulate the position as between members of a company and its creditors. Whether the actual decision in *Houldsworth* can stand against the provisions of the Trade Practices Act is a question which does not arise. As we said earlier in these reasons, the critical question in this appeal concerns the provisions of the Code.

In addition to the provision for recovery of loss or damage under s. 82 of the Trade Practices Act, s. 87 confers on the Federal Court or on any other court invested with the relevant jurisdiction a wide range of powers where a person has suffered or is likely to suffer loss or damage by reason of conduct engaged in in contravention of Pts IV, IVA or V of the Act. Section 52 lies within Pt V - Consumer Protection.

One of those powers s. 87(2)(a) is to make an order:

> declaring the whole or any part of a contract ... to be void and, if the Court thinks fit, to have been *void ab initio* or at all times on and after such date ... as is specified in the order.

It was the appellant's contention that the Trade Practices Act provided its "own code of remedies, unfettered".

The Trade Practices Act is unquestionably a piece of innovative legislation. But it is not to be seen as eliminating, "by a side-wind". See *Parkdale Custom Built Furniture Pty. Ltd. v. Puxu Pty. Ltd.* [1982] 149 CLR 191, per Brennan J. at p. 224, the detailed provisions established for more than a hundred years to govern the winding up of a company. Furthermore, in *Trade Practices Commission v. Milreis Pty. Ltd.* [1977] 14 ALR 623 Brennan J. and Deane J., as members of the Federal Court, made it clear that s. 87(2)(a) is not to be understood as conferring a power to declare void a contract which was valid at its inception, other than through the operation of some other provision of the Trade Practices Act or by reason of some alteration in circumstances, *ibid.*, per Brennan J. at pp. 638-639; Deane J. at pp. 645-646.

Estoppel

The appellants also contended that if they were precluded from maintaining any action against the building societies by reason of their winding up, nevertheless they could maintain an action against the liquidator based on estoppel. As we understood the argument, it was that the liquidator was estopped from denying that fraudulent representations were made by the building societies to the holders of non-withdrawable shares.

Now it may be true that a liquidator of a company is not entitled to disregard the actual transaction that took place between a shareholder and the company. See by way of illustration *Burkinshaw v. Nicolls* [1878] 3 App. Cas. 1004. But a liquidator may resist a claim against the assets available for distribution on the ground that the claim is unenforceable against the company or that, although enforceable against the company, it is founded on an act or omission of the company which "unjustly prejudices the interests of the creditors or contributories"; *Tanning Research Laboratories Inc. v. O'Brien* [1990] 169 CLR 332, esp. per Brennan and Dawon JJ. at p. 339. And estoppel will not operate so as to defeat a statutory scheme which obliges the liquidator to distribute the real assets among the true creditors; *In re Exchange Securities Ltd.* [1988] Ch. 46. In the present case estoppel cannot operate to give the appellants an entitlement which the terms of the Act and the Code combine to deny them.

Section 82(2) of the Bankruptcy Act

Part VI of the Bankruptcy Act 1966 (Cth) is headed "Administration of Property". Division 1 of Pt VI is headed "Proof of Debts". Section 82, which is within Div. 1, identifies debts provable in bankruptcy; sub-s. (2) reads:

> Demands in the nature of unliquidated damages arising otherwise than by reason of a

contract, promise or breach of trust are not provable in bankruptcy.

If the holders of non-withdrawable shares in the building societies have no entitlement to rescission or damages, questions under the Bankruptcy Act do not arise; there is no debt or liability on the part of the societies. It is only if any claim to damages is not extinguished by reason of the winding up of the societies that the operation of s. 82(2) becomes important. Section 82(2) is incorporated into the winding up provisions by s. 438 of the Code. Section 438 is within Pt XII of the Code and therefore applies to building societies by virtue of s. 121(4) of the Act. It serves to preclude any shareholder in the building societies with a claim in damages from proving in the winding up unless that shareholder can establish that his or her claim for unliquidated damages (as, it is accepted, any claim must be) arises by reason of "a contract, promise or breach of trust".

Because of the view he took of the operation of the Code, Tadgell J. found it unnecessary to deal with s. 82(2) of the Bankruptcy Act. In his view, "a claim for unliquidated damages by the holder of non-withdrawable investing shares is in any event excluded from proof"; [1992] 2 VR, at p. 631. With these remarks we respectfully agree. As the argument developed it became apparent that, on the material before this Court, it was not possible to identify all the bases of claim that might be available to the holders of non-withdrawable shares. Consequently, as was foreshadowed on the hearing of the application for special leave to appeal, the operation of s. 82(2) was excluded from consideration by the Court.

Conclusion

It need hardly be said that nothing in this judgment affects any cause of action the appellants may have against directors or officers of the building societies or against anyone else. But, for the reasons appearing in the judgment, they have no claim against the building societies which can prevail against the claims of creditors and the appeal must be dismissed.

McHugh J.

In my opinion, the appeal should be allowed. The facts, issues and statutory provisions are set out in the judgment of Mason CJ, Deane, Dawson and Toohey JJ.

The rule in Houldsworth

The rule approved by the House of Lords in *Houldsworth v. City of Glasgow Bank* [1880] 5 App. Cas. 317 is in my view misconceived and a source of injustice. The rule is misconceived because a company is an entity separate from the shareholders. There is no reason in legal principle or commercial necessity why, after the commencement of a winding up, a shareholder should not be able to sue a company for damages arising out of a fraudulent misrepresentation concerning the allotment of shares to the shareholder. The rule is a source of injustice because, once the company goes into liquidation, the shareholder can neither rescind the contract of allotment nor obtain damages. In that situation, the creditors and, when there is a surplus of assets over liabilities, the other shareholders profit at the expense of the defrauded shareholder unless there is a full return of capital. However, the rule is too deeply entrenched to be set aside by judicial decision.

The rule in *Houldsworth* must have been applied on scores - probably hundreds - of occasions in the course of the winding up of companies in this country. Numerous pieces of company legislation have been enacted on the basis that it represents the law and that the assets of a company will be distributed in reliance on it. Significantly, s. 360(1)(k) of the Companies (Victoria) Code ("the Code") seems to have been enacted on the basis that it is an entrenched rule of company law. It must be regarded as a rule that has been **expressly** considered and approved by the various legislatures of this country. Consequently, I do not think that this Court should use its undoubted power to remove from the stock of common law rules an antiquated rule which is a source of injustice and inconvenience. In any event, even if this Court refused to follow *Houldsworth*, the provisions of s. 360(1)(k) would prevent a shareholder proving "a debt" based on the common law or, in the absence of a contrary intention, a state statute; *In re Hull and County Bank (Burgess's Case)* [1880] 15 Ch. D 507; *In re Addlestone Linoleum Company* [1887] 37 Ch. D 191

The Trade Practices Act 1974 (Cth)

However, the rule in *Houldsworth* cannot prevail against the manifest width of the provisions of the Trade Practices Act.

The arguments of the parties proceeded upon the assumption that, before the winding up, the holders of non-withdrawable shares had claims against the building societies for misleading or deceptive conduct in breach of s. 52 of that Act. Section 82 of that Act empowers a court to award damages for breach of s. 52. Section 87(1) of the Act also confers power on a Court to make such orders as it sees fit against a person who has contravened the Trade Practices Act, irrespective of whether relief is granted under other provisions of that Act. For example, s. 80 (injunction) or s. 82 (damages). Section 87(2)(a) and (c) provide that the Court may make:

> (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been *void ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;
> ...
> (c) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage.

Tadgell J., who gave the leading judgment in the Court of Appeal *State of Victoria v. Hodgson* [1992] 2 VR 613, declined to consider the effect of s. 87 because there was "no knowing" what form an order under that section might take and because it "would be futile ... to answer question (b) on the mere off-chance that an order of that kind might possibly be made on some facts now unknown" *ibid.*, at p. 630. Furthermore, his Honour said that it would be inappropriate to decide the breadth of the remedies available under the Trade Practices Act in a factual vacuum. But Tadgell J. said that, even on the assumption that the holders of non-withdrawable shares had a claim for damages in accordance with s. 82 of the Trade Practices Act, such damages could not be the subject of proof in the winding up of the societies. His Honour said *ibid.*, at p. 631:

> To hold otherwise would be to regard the Trade Practices Act as intending to overturn by implication a cardinal tenet of limited liability which has prevailed for 130 years. It would be surprising indeed if the Trade Practices Act had that intention or effect: cf. *Parkdale Custom Built Furniture Pty. Ltd. v. Puxu Pty. Ltd.* [1982] 149 CLR 191, per Brennan J. at pp. 224-225.

However, I can see no justification for reading into the unambiguous words of ss. 82 and 87 some implied limitation on their use in relation to companies in liquidation. The Trade Practices Act is a fundamental piece of remedial and protectionist legislation. See *Devenish v. Jewel Food Stores Pty. Ltd.* [1991] 172 CLR 32, at p. 44. Such legislation should be construed broadly so as "to give the fullest relief which the fair meaning of its language will allow"; *Bull v. Attorney-General for New South Wales* [1913] 17 CLR 370, at p. 384 quoted with approval in *Devenish* [1991] 172 CLR, at p. 44. See also *Account Systems v. CCH* [1993] 114 ALR 355, at p. 387. The Full Court of the Federal Court has held that leave may be given to bring an action, based on s. 52 of the Trade Practices Act, against a company in liquidation; *Vagrand Pty. Ltd. (in Liq.) v. Fielding* [1993] 113 ALR 128. Nothing in the Trade Practices Act gives any ground for holding that an award of damages under s. 82 is subject to the rule in *Houldsworth*. The Court also has a wide power to grant relief under s. 87. In terms, that section would authorise an order rescinding a shareholder's contract with a building society even after the commencement of the winding up, notwithstanding "the well known rule that a member of a company loses on the commencement of a winding up any right he might otherwise have had to the rescission of his contract of membership; *Southern British National Trust Ltd. v. Pither* [1937] 57 CLR 89, at p. 113.

In enacting ss. 82 and 87, it is unlikely that federal Parliament gave any thought to the rules for which *Trevor v. Whitworth* [1887] 12 App. Cas. 409, *Ooregum Gold Mining Company of India v. Roper* [1892] AC 125, *Oakes v. Turquand* [1867] LR 2 HL 325 or *Houldsworth* [1880] 5 App. Cas. 317 are authority. What is clear, however, is that in enacting s. 82 Parliament gave a court, exercising jurisdiction under the Trade Practices Act, the power to award damages against a company whether or not it was in liquidation. Furthermore, it gave such a Court the power, in the exercise of its discretion, to vary or set aside any contract or contractual provision upon proof of a breach of the Act. In these circumstances, this Court should give

effect to the terms of those sections. It should hold that it is for a court, exercising jurisdiction under the Trade Practices Act, to determine, as a matter of discretion, whether leave should be given to proceed against a company in liquidation and what, if any, orders should be made against such a company upon proof of a breach of the Act.

In *Knight v. F.P. Special Assets Ltd.* [1992] 174 CLR 178, at p. 205, Gaudron J. pointed out:

> It is contrary to long-established principle and wholly inappropriate that the grant of power to a Court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant.

In interpreting s. 88F of the Industrial Arbitration Act 1940 (NSW), which is in terms not dissimilar to s. 87(2), both this Court and the New South Wales Court of Appeal have refused to subject the ordinary meaning of the words of s. 88F to any implied limitation. See *Brown v. Rezitis* [1970] 127 CLR 157; *Hoffman v. Industrial Commission (NSW)* [1990] 33 IR 139; *Fernance v. Wreckair Pty. Ltd.* [1991] 22 NSWLR 439. Similarly, in my opinion, the Court should not read any limitation into the terms of ss. 82 and 87 even when the limitation is based on a rule as long-standing as the rule in *Houldsworth* or as long-standing as the rule in *Oakes*.

By agreement, the question of the effect of the incorporation of s. 82 of the Bankruptcy Act 1966 (Cth) into the Code was not debated in this Court. However, since that provision operates as state law in a winding up, it is difficult to see how it could affect the power of a court exercising the federal jurisdiction conferred by the Trade Practices Act.

Subject to any effect of s. 82 of the Bankruptcy Act, as incorporated in the Code by s. 438(2), I would answer the questions as follows:

(a) Yes.

(b) No.

The appeal should be allowed.